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DOES A CLAIM EXIST FOR DECEDENTS' PRE-DEATH PAIN AND SUFFERING IN ACTIONS ARISING OUT OF AVIATION DISASTERS GOVERNED BY THE WARSAW CONVENTION AND THE DEATH ON THE HIGH SEAS ACT?: THE NEED FOR LEGISLATIVE REFORM

INTRODUCTION

Imagine a flight departing from Miami, bound for Paris.¹ En route, the airplane experiences mechanical difficulties and crashes into the Atlantic Ocean. Only one passenger survives the impact. He sustains serious injuries that after several months of hospitalization cause his death.

Upon his death, both his dependents and his estate hire an attorney to file claims against the airline. In response, the airline files a motion to dismiss, asserting that there is no basis for the survivorship action. After days of research to determine whether the motion has merit, the attorney concludes that there is no simple answer.

The Warsaw Convention² governs all actions involving international air travel. Because the crash occurred over international waters, these claims are also governed by the Death on the High Seas Act ("DOHSA").³

It is well-established that DOHSA allows the decedent's dependents to recover in claims for wrongful death in actions arising under the Warsaw Convention.⁴ However, there is much debate as to whether a survival action, initiated by and on behalf of the decedent's estate, is sustainable in DOHSA actions arising under the Warsaw Convention.⁵ If survival actions are permitted, the decedent's estate may recover for any pain and suffering the decedent experienced before dying. If DOHSA preempts survival actions, pre-death pain and suffering damages are not recoverable.

Currently, there is a split among the circuits regarding whether survivorship actions exist under DOHSA.⁶ Some courts hold that DOHSA

1. *Dateline NBC* (NBC television broadcast, Oct. 13, 1996).

2. Convention for the Unification of Certain Rules Relating to International Transportation By Air, opened for signature Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. app. 40105 (1994) [hereinafter Warsaw Convention].

3. 46 U.S.C. app. §§ 761-68 (1994).

4. *See infra* notes 17-18 and accompanying text.

5. *See infra* notes 42-43, 53-54 and accompanying text.

6. For a discussion on the Supreme Court's refusal to resolve this split, see *infra* note 52 and accompanying text.

only expressly sanctions wrongful death actions, thereby preempting all other sources of recovery including survival actions.⁷ Other courts conclude that DOHSA does not preempt survival actions because its scope is limited to wrongful death claims.⁸ Therefore, survival actions under state or general maritime law are permitted along with wrongful death claims under DOHSA.⁹

This Note will address the issue of whether, in actions arising out of air disasters on the high seas, DOHSA completely preempts all other bases of recovery, or whether it may be supplemented with survival actions under either state or general maritime law. Specifically, it will discuss the recoverability of damages for decedents' pre-death pain and suffering in actions to which DOHSA is applicable. Part I will consist of a discussion of the Warsaw Convention and DOHSA. This section will also discuss courts' interpretation of the interplay between the two Acts. Part II will provide an overall history of the issue presented, and will highlight the various decisions providing the basis for opposing points of view. Part III will address the arguments in support of, and in opposition to supplementing DOHSA with survival actions. Part IV will summarize recent lower federal court decisions on this issue. Part V will conclude that, under current law, DOHSA preempts all other statutory and common-law sources of recovery; thus it may not be supplemented with survival actions under state or general maritime law. Yet this result is grossly unfair to litigants in aviation disaster cases. Therefore Part V proposes that Congress should modify DOHSA or enact new legislation, applicable solely to claims under the Warsaw Convention, to permit litigants to initiate both wrongful death and survivorship claims.

I

In *Zicherman v. Korean Air Lines Co.*,¹⁰ the Supreme Court concluded that actions arising out of international aviation disasters on the high seas are governed by both the Warsaw Convention and DOHSA.¹¹ The Court held that the Warsaw Convention permits claims for "damages sustained" in an international aviation disaster,¹² while DOHSA provides for the recovery of

7. See *infra* note 53 and accompanying text.

8. See *infra* notes 42-43, 54 and accompanying text.

9. See *infra* notes 42-43, 54 and accompanying text.

10. 116 S. Ct. 629, 632-34 (1996). This case, along with all others discussed herein in which Korean Air Lines is a named party, involves the crash of Korean Air Lines flight 007 on September 1, 1983 over the Sea of Japan. *Id.* All 269 persons aboard were killed. *Id.* at 631.

11. *Id.* at 636.

12. *Id.* In *Zicherman*, the Supreme Court interpreted "dommage sustained," within Article 17 of

damages where there has been a death on the high seas.¹³ However, the Supreme Court has yet to decide whether DOHSA preempts survivorship actions, or whether such claims may be initiated, along with wrongful death claims, under state or general maritime law.¹⁴

A. Death on the High Seas Act

In *The Harrisburg*, the Supreme Court concluded that general maritime law does not provide the basis for wrongful death actions.¹⁵ In response to this preclusive ruling, Congress enacted DOHSA in 1920.¹⁶ Modeled after Lord Campbell's Act,¹⁷ DOHSA was intended to provide a wrongful death cause of action to beneficiaries of those individuals killed on the high seas as a result of neglect or wrongful act.¹⁸ DOHSA specifically provided that such

the Warsaw Convention, to mean "legally cognizable harm." *Id.* at 632-33. For a discussion of what constitutes such harm, see *infra* note 27.

13. 46 U.S.C. app. § 761 (1994).

14. In *Zicherman v. Korean Air Lines Co.*, 43 F.3d 18 (2d Cir. 1994), the Second Circuit Court of Appeals awarded damages for pre-death pain and suffering because plaintiff presented evidence from which it could be "inferred that passenger[s] underwent some suffering before impact." *Id.* at 23 (quoting *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 206 (2d Cir. 1984)). The recovery was available through a survivorship action under federal maritime law. *Id.* In its petition for *certiorari* to the Supreme Court, *Korean Air Lines* failed to challenge this award for pre-death pain and suffering. *Zicherman*, 116 S. Ct. at 631 n.1. Therefore, the Supreme Court expressly declined to review the recoverability of such damages. *Id.* Furthermore, the Court recently denied *certiorari* in two lower court decisions on this issue. See *infra* note 52. It is interesting to note that some lower federal courts have allowed victims' beneficiaries to recover damages for pre-death pain and suffering, in part, because the attorney for *Korean Air Lines* failed to challenge this award before the Supreme Court. See *Beirn v. Korean Air Lines Co.*, No. 83-4624, slip. op. at 20 (E.D.N.Y. Aug. 28, 1996); *Spir v. Korean Air Lines Co.*, No. 83-4626, slip. op. at 20 (E.D.N.Y. Aug. 28, 1996). See *infra* note 107.

15. *The Harrisburg*, 119 U.S. 199 (1886). This case involved a suit for wrongful death arising out of a collision between a steamer and a schooner in a Massachusetts sound. The Court denied plaintiffs recovery on grounds that no action for wrongful death could be maintained under general maritime law in the absence of a federal statute providing for such a right. *Id.* at 213. Furthermore, the Court, in reaching its decision, relied on the commonly-held belief that the cause of action died with the victim, and therefore could not be sustained post-mortem. *Id.*; see also Ugo Colella, *The Proper Role of Special Solitude in the General Maritime Law*, 70 TUL. L. REV. 227, 246 (1995).

16. After *The Harrisburg*, Congress tried unsuccessfully to enact federal legislation sanctioning wrongful death actions in navigable water. See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 235 (Powell, J., concurring in part and dissenting in part) (discussing legislative history of DOHSA). An early version of DOHSA, originally proposed in 1917, created a federal cause of action for wrongful death occurring on the high seas. *Id.* at 235-36. It was to operate concurrently with state statutes providing the basis for wrongful death claims in actions arising out of territorial waters. *Id.* This bill was never enacted, however, due to the inception of World War I. *Id.* Finally, in 1920, the present version of DOHSA was brought before Congress. *Id.*

17. 59 CONG. REC. 4482 (1920). Lord Campbell's Act was the first of a number of statutes enacted in numerous European nations that served as a "more humane and enlightened policy [allowing] dependent parties to recover in case of death of their near relatives upon the high seas." *Id.*

18. Section 761 provides:

[W]henver the death of a person be caused by wrongful act, neglect or default occurring on the

beneficiaries may recover for pecuniary losses sustained.¹⁹

B. Warsaw Convention

In 1934, the United States became a signatory member of the Warsaw Convention.²⁰ The Warsaw Convention was designed to govern all actions arising out of international air travel.²¹ The purposes behind the Warsaw Convention were two-fold: to create uniform legal principles governing international air travel and to limit international air carrier's liability.²² In *Benjamin v. British European Airways*,²³ the Second Circuit held that Article 17 creates a cause of action under the Warsaw Convention.²⁴

high seas beyond a maritime league away from shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if the death had not ensued.

46 U.S.C. app. § 761 (1994). The Supreme Court has held that this section preempts state law wrongful death claims in actions arising out of deaths on the high seas. *See Tallentire*, 477 U.S. at 231-32. Prior to the Court's decision in *Tallentire*, however, some lower courts believed that DOHSA did not preempt wrongful death causes of action under state law. *Id.* at 210-11. Courts relied on section 767 of DOHSA, which states in part that "the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." 46 U.S.C. app. § 767 (1988). However, the Supreme Court determined that this is merely a "jurisdictional savings clause," granting state courts concurrent jurisdiction to hear DOHSA actions for wrongful death. *See Tallentire*, 477 U.S. at 232. Therefore, the Supreme Court held that DOHSA preempts all other actions for wrongful death on the high seas. *Id.* However, this conclusion is restricted to wrongful death actions. It does not address whether DOHSA preempts survival claims under state or general maritime law. For a discussion of the definition of wrongful death actions, *see infra* notes 59-60 and accompanying text.

19. Section 762 states that:

[t]he recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may have severally suffered by reason of the death of the person by whose representative the suit is brought.

46 U.S.C. app. § 762 (1994). For further discussion of pecuniary loss, *see infra* note 40.

20. *See* Warsaw Convention, *supra* note 2.

21. William C. Brown, III, *Problems Arising From the Intersection of Traditional Maritime Law and Aviation Death and Personal Injury Liability*, 68 TUL. L. REV. 577, 591 (1994).

22. *Id.* at 591; *see also* Luis F. Ras, *Warsaw's Wingspan Over State Laws: Towards a Streamlined System of Recovery*, 59 J. AIR L. & COM. 587 (1994); James M. Grippando, *Warsaw Convention—Federal Jurisdiction and Air Carrier Liability for Mental Injury: A Matter of Limits*, 19 GEO. WASH. J. INT'L L. & ECON. 59 (1985); Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967).

23. 572 F.2d 913 (2d Cir. 1978).

24. *Id.* at 916-18; *see also* Steven R. Pounian & Blanca Rodriguez, *Recent Developments in Aviation Law*, 31 TORT & INS. L. J. 149, 150 n.4 (1996); *St. Paul Ins. Co. v. Venezuelan Int'l Airways, Inc.*, 807 F.2d 1543 (11th Cir. 1987); *Boehringer-Mannheim Diagnostics, Inc. v. Pan Am. World Airways, Inc.*, 737 F.2d 456 (5th Cir. 1984); *In re Mexico City Aircrash*, 708 F.2d 400 (9th Cir. 1983). Article 17 provides that:

The carrier shall be liable for damage sustained in the event of the death or wounding of the

C. Interplay Between DOHSA and Warsaw Convention

In the past, courts have struggled to determine whether DOHSA and the Warsaw Convention should be applied concurrently to actions arising out of international aviation disasters on the high seas.²⁵ However, in *Zicherman*, the Supreme Court resolved this conflict by creating a framework for cases governed by both DOHSA and Warsaw Convention.²⁶ The Court concluded that where an incident has occurred involving international air travel, the Warsaw Convention creates the right to bring an action.²⁷ However, the Warsaw Convention does not determine the nature of those actions that may be initiated.²⁸ Instead, it mandates that "such matters [be relegated] to the laws of the nation in which the action is filed."²⁹

In the United States, there is no specific legislation dictating the types of

passenger, or any other bodily injury suffered by the passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Warsaw Convention, *supra* note 2, at art. 17.

25. Previously, some courts held that any inconsistencies between the Warsaw Convention and DOHSA should be resolved in favor of the Warsaw Convention. They reason that Congress enacted DOHSA before signing the Warsaw Convention. According to the Restatement of the Law of Foreign Relations of the United States § 135, "[w]hen [treaties] conflict, the subsequent one controls." (*cited in In re Korean Air Lines Disaster*, 814 F. Supp. 599, 604 (S.D.N.Y. 1993)). *See also In re Korean Air Lines Disaster*, 807 F. Supp. 1073 (S.D.N.Y. 1992) (in actions in which Warsaw Convention and DOHSA conflict, the former prevails); *In re Air Crash Disaster Near Honolulu, Hawaii*, 783 F. Supp. 1261, 1265 (N.D. Cal. 1990) (the court determined that the Convention preempts "local laws" if there is a conflict between the two).

26. *Zicherman v. Korean Air Lines*, 116 S. Ct. 629, 636 (1996).

27. *Id.* Specifically, the Supreme Court determined that the action was sustainable under Article 17 of the Warsaw Convention. The Court based its conclusion on the presence of the word "dommage" in Article 17, which the Court interpreted as referring to "legally cognizable harm." *Id.* at 633. Under this interpretation, the text of Article 17 provides the basis for a cause of action, but does not determine exactly what harm is deemed "cognizable." *Id.*

28. In *Zicherman* the Supreme Court concluded that the "law of the [Warsaw] Convention does not affect the substantive questions of who may bring suit and what they may be compensated for. Those questions are to be answered by the domestic law selected by the courts of the contracting states." *Id.* at 634. Despite this language, some courts still insist that the Warsaw Convention itself affords a basis for survival and wrongful death actions. *See, e.g., In re Air Crash Disaster Near Honolulu, Hawaii*, 783 F. Supp. at 1263 (concluding that the Warsaw Convention was written in the context of civil law which, unlike common law, does not make the distinction between wrongful death and survival actions; therefore, even without specific language providing for survival remedies, such are recoverable because they are implicit in the language of the Convention); *see also Beirn v. Korean Air Lines Co.*, No. 83-4624 (E.D.N.Y. Aug. 28, 1996); *Yun v. Korean Air Lines Co.*, 798 F. Supp. 755 (E.D.N.Y. 1992). While these holdings have not been expressly overturned, it is unlikely, in light of *Zicherman*, that damages will be recoverable under any source other than the domestic law of the nation in which the action is filed. For a discussion of this issue, *see Jimmy Wilkins, Comment, Application of Admiralty Jurisdiction to Aviation Disasters on the High Seas*, 20 TUL. MAR. L. J. 465, 484-85 (1996).

29. *Beirn*, No. 83-4624, slip. op. at 3.

sustainable actions under the Warsaw Convention. Therefore, courts must apply the “law that would govern in absence of the Warsaw Convention.”³⁰ The Supreme Court has recognized that, where aviation disasters occur on the high seas, DOHSA governs wrongful death claims.³¹ Yet the *Zicherman* Court failed to address whether DOHSA applies to, and therefore preempts, survivorship claims arising out of deaths on the high seas.³²

II. HISTORY OF THE CONFLICT

Prior to 1970, the question of whether DOHSA is the exclusive basis of recovery for deaths on the high seas had never been brought before the Supreme Court.³³ In 1970, however, the Court considered this issue in *Moragne v. States Marine Lines, Inc.*³⁴ This case involved a wrongful death action for unseaworthiness brought by the widow of a longshoreman killed in territorial waters.³⁵ States Marine argued that the action should be dismissed on grounds that DOHSA is inapplicable to wrongful death actions for deaths occurring in territorial waters.³⁶ Rather, States Marine asserted that DOHSA expressly limits recovery to actions arising out of wrongful death on the high seas.³⁷ The Court disagreed, holding that although DOHSA does not

30. *Zicherman*, 116 S. Ct. at 636.

31. *Id.* Furthermore, DOHSA preempts all other wrongful death claims for deaths on the high seas. *See supra* note 18.

32. *See infra* note 52.

33. Before, 1970, however, several lower courts addressed the issue of DOHSA’s exclusivity, a number of which freely allowed DOHSA to be supplemented with survival actions under state law. *See* Joseph F. Smith, Jr., *A Maritime Survival Remedy: Is There Life After Higginbotham?*, 6 MAR. LAW. 185, 187 (1981) (citing to *Canillas v. Joseph H. Carter, Inc.*, 280 F. Supp. 48, 51 (S.D.N.Y. 1968); *Saffir v. Compagnie Generale Transatlantique*, 241 F. Supp. 501 (E.D.N.Y. 1965); *Montgomery v. Goodyear Tire & Rubber Co.*, 231 F. Supp. 447 (S.D.N.Y. 1964); *Burns v. Marine Transp. Lines*, 207 F. Supp. 276 (S.D.N.Y. 1962); *United States v. The S.S. Washington*, 172 F. Supp. 905, 908 (E.D. Va.), *aff’d sub nom.* *United States v. Texas Co.*, 272 F.2d 711 (4th Cir. 1959); *Carli V. New London Flying Serv., Inc.*, 1965 A.M.C. 1644, 1646-47 (D. Conn. 1962); *Abbott v. United States*, 207 F. Supp. 468, 473 (S.D.N.Y. 1962); *In re Gulf Oil Corp.*, 172 F. Supp. 911, 915-17 (S.D.N.Y. 1959)).

34. 398 U.S. 375 (1970).

35. *Id.* at 376.

36. *Id.*

37. *Id.* In *The Harrisburg*, 119 U.S. 199 (1886), the Supreme Court held that no wrongful death action exists under general maritime law for deaths at sea. In response, many states enacted legislation which allowed beneficiaries to recover for wrongful death occurring in territorial waters. Soon thereafter, Congress enacted DOHSA, which created a statutory wrongful death remedy for death on the high seas. *Moragne*, 398 U.S. at 397-98. Despite the enactment of DOHSA, persons who initiated actions for wrongful death in territorial waters were still governed by state laws, not DOHSA. *Id.* at 398-99. Moreover, those whose actions were governed by state law recovered primarily under negligence claims, whereas plaintiffs governed by DOHSA recovered under actions for unseaworthiness. *Id.* Initially, this distinction was irrelevant given that recovery was essentially uniform. *Id.* Yet the distinction still precluded plaintiffs wishing to recover for wrongful death in

specifically provide a wrongful death remedy for deaths occurring in territorial waters, "no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law."³⁸ As a result, the Supreme Court determined that the absence of any Congressional intent to prohibit wrongful death actions under general maritime law implies that such actions are judicially recognizable.³⁹ Therefore, this decision formally established a general maritime wrongful death action in non-DOHSA claims by which plaintiff could recover.⁴⁰

Subsequently, lower federal courts expanded the Supreme Court's decision in *Moragne*⁴¹ and permitted the joinder of claims under DOHSA with survival actions under state or general maritime law.⁴² These courts determined that while DOHSA itself does not afford the basis for survival actions, the Supreme Courts' reasoning in *Moragne* does permit these additional claims.⁴³ The practice of supplementing DOHSA occurred without

territorial waters from initiating unseaworthiness claims because such were not sanctioned under state law, and DOHSA was inapplicable. For example, in *Moragne*, States Marine argued that because Florida law did not permit unseaworthiness actions, plaintiff's claim should be dismissed. *Id.* at 376.

38. *Moragne*, 398 U.S. at 400. The Court concluded that Congress did not extend DOHSA's coverage to actions for wrongful death in territorial waters because at the time, the remedies afforded by state law were adequate. *Id.* Eventually, however, the unseaworthiness doctrine became the "principal vehicle for recovery . . . overshadowing the negligence action." *Id.* at 399. Therefore, DOHSA's adoption of general maritime's unseaworthiness doctrine rendered it a more superior remedial basis than state law. *Id.* The Court concluded that Congress could not have foreseen the disparity between recovery under DOHSA and under state law. *Id.* at 401-02.

In enacting DOHSA, Congress chose not to address actions arising out of territorial waters merely because state law provided for seemingly ample recovery for such claims. Congress' failure to extend DOHSA's coverage to territorial waters does not require that parties seeking to recover for deaths caused by unseaworthiness must go without compensation. Rather, such plaintiffs may recover for unseaworthiness under general maritime law. *Id.* at 399. Therefore, in *Moragne*, plaintiff was able to maintain his unseaworthiness claim. *Id.*

39. *Id.* at 393.

40. *Id.* at 402. After *Moragne*, the Supreme Court, in *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974), defined the types of recoverable damages in actions for wrongful death in territorial waters under general maritime law. The Court determined that recoverable damages included: loss of support, loss of society, loss of services, and funeral expenses. *Id.* at 584.

41. See *supra* notes 34-39 and accompanying text.

42. See, e.g., *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974); *Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc.*, 466 F.2d 903, 909 (8th Cir. 1972); *Greene v. Vantage Steamship Corp.*, 466 F.2d 159 (4th Cir. 1972); *Dennis v. Central Gulf Steamship Corp.*, 453 F.2d 137 (5th Cir. 1972); *Dugas v. Nat'l Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971).

43. For example, in *Dennis*, the Fifth Circuit permitted DOHSA to be supplemented with a survival action under state law, thus enabling plaintiff to recover for decedent's pre-death pain and suffering. 453 F.2d at 140. In addition, the Fifth Circuit recognized that general maritime law allows recovery for pain and suffering. *Id.* Therefore, by allowing parties to recover such damages under supplemental general maritime actions, the court merely removed "a bar to access to the existing general maritime law." *Id.* at 141 (citing *Moragne*, 398 U.S. at 405-06). Additionally, in *Spiller*, the Eighth Circuit allowed DOHSA to be supplemented based on its view that "the thrust of *Moragne* is

controversy for several years, until the Supreme Court revisited the issue in *Mobile Oil Corp. v. Higginbotham*.⁴⁴

In *Higginbotham*, the Supreme Court considered whether parties, employing the *Moragne* rationale,⁴⁵ could supplement claims for wrongful death under DOHSA with claims for wrongful death under state or general maritime law, and thereby recover for non-pecuniary losses.⁴⁶ The Court held that, under DOHSA, recovery is explicitly limited to pecuniary losses.⁴⁷ As a result, damages for non-pecuniary loss of society are not recoverable.⁴⁸ Furthermore, the *Higginbotham* Court concluded that DOHSA is the exclusive remedy for deaths on the high seas.⁴⁹ Therefore, DOHSA precludes additional claims for wrongful death under either general maritime or state law to recover for non-pecuniary losses. As the Court stated, "when [DOHSA] does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless."⁵⁰

Since *Moragne* and *Higginbotham*, the Supreme Court has considered a number of issues relating to DOHSA's exclusivity.⁵¹ Yet it has never directly determined whether DOHSA may be supplemented with survival claims

that the law of admiralty should be expanded so that seamen are given a federal right to recover" 466 F.2d at 910.

44. 436 U.S. 618 (1978).

45. See *supra* note 38.

46. *Higginbotham*, 436 U.S. at 619. *Higginbotham* involved a wrongful death action brought by the widows of passengers who were killed in a helicopter crash in connection with oil drilling operations on the high seas. *Id.* The widows initiated a wrongful death action which, among other claims, sought to recover for loss of society. *Id.* The district court concluded that the plaintiffs could not recover for non-pecuniary loss of society damages because DOHSA specifically limits recovery to pecuniary losses sustained. *Higginbotham v. Mobil Oil Corp.*, 360 F. Supp. 1140, 1150 (W.D. La. 1973). The court of appeals reversed, holding that, under a *Moragne* rationale, plaintiff could recover for loss of society in a supplemental wrongful death action under general maritime law. *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422 (5th Cir. 1977).

47. *Higginbotham*, 436 U.S. at 623.

48. *Id.*

49. *Id.* at 623-25. As the Court notes, DOHSA "announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributors negligence, survival and damages." *Id.* at 625.

50. *Id.*

51. The Court has confirmed its holding in *Moragne* that DOHSA does not preempt state and general maritime actions in cases arising out of death in territorial waters. See *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980). The Court has also determined that plaintiffs may initiate supplemental survival actions for deaths in territorial waters. *Yamaha Motor Corp., v. Calhoun*, 516 U.S. 199 (1996). In other cases, the Court has held that DOHSA itself limits recovery to pecuniary damages; thus DOHSA may not be supplemented with wrongful death actions under general maritime or state law that would afford remedies for non-pecuniary losses. See, e.g., *Zicherman v. Korean Air Lines Co.*, 116 S. Ct. 629, 636 (1996); *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Offshore Logistics Inc. v. Tallentire*, 477 U.S. 207 (1986).

under state or general maritime law. In fact, in its 1996 term, the Court expressly declined to consider this issue, as it denied *certiorari* in two cases with contrary holdings.⁵²

However, several lower courts have addressed whether DOHSA preempts state or general maritime survival actions. Some courts, such as the Sixth and Ninth Circuits, have employed reasoning similar to *Higginbotham*, holding that DOHSA may not be supplemented by wrongful death or survival actions.⁵³ Other lower courts, including the Fourth Circuit, the D.C. Circuit, and the District of Rhode Island, have freely allowed DOHSA to be supplemented with survival actions under other bodies of law to provide recovery for such non-pecuniary damages as decedent's pre-death pain and suffering.⁵⁴

III. ARGUMENTS IN SUPPORT OF AND IN OPPOSITION TO SUPPLEMENTING DOHSA

The arguments in support of, and in opposition to, supplementing DOHSA with survivorship claims under state or general maritime law are similar in that they both rely on the same overall premises, namely that DOHSA's plain language and legislative intent support their respective positions.

52. See *Saavedra v. Korean Air Lines Co.*, 93 F.3d 547 (9th Cir.), *cert. denied*, 117 S. Ct. 584 (1996); *Forman v. Korean Air Lines Co.*, 84 F.3d 446 (D.C. Cir.), *cert. denied*, 117 S. Ct. 582 (1996). When the Supreme Court denied *certiorari* in these cases, it left intact a split among the circuits. This split allows litigants to engage in forum shopping, given that they will undoubtedly file suits in those jurisdictions that permit the recovery of damages for decedent's pre-death pain and suffering in survival actions. Interview with Andrew C. Hall, Esquire, in Miami, Fla. (Mar. 3, 1997). Furthermore, this circuit split risks exposing airlines to varying degrees of liability depending upon the jurisdiction in which the action is filed. This would contravene one of the Warsaw Convention's underlying goals, to create a uniform system of recovery. See *infra* note 57. Accordingly, this issue must be resolved.

However, the Supreme Court recently granted *certiorari* in a case arising out of the District of Columbia, in which the question presented is whether litigants may supplement DOHSA claims with survivorship claims under either state or general maritime law. *Dooley v. Korean Air Lines Co.*, 117 F.3d 1477 (D.C. Cir. 1997), *cert. granted*, 66 U.S.L.W. 3324 (U.S. Jan. 9, 1998) (No. 97-704). Oral arguments are set for sometime in April, 1998.

53. *Saavedra*, 93 F.3d 547; *Bickel v. Korean Air Lines Co.*, 83 F.3d 127 (6th Cir. 1996), *rev'd*, 96 F.3d 151 (6th Cir. 1996); *In re Air Disaster Near Honolulu, Hawaii*, 792 F. Supp. 1541 (N.D. Cal. 1990).

54. See *Forman*, 84 F.3d at 448-49 (D.C. Circuit concluded that damages for decedent's pre-death pain and suffering are recoverable in supplemental survival actions); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 894 (5th Cir. 1984) (holding that general maritime law can be used to supplement DOHSA in order to provide beneficiaries with a basis for survival actions); see also *McAleer v. Smith*, 791 F. Supp. 923 (D.R.I. 1992); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F. Supp. 1277 (W.D. Pa. 1983); *Chute v. United States*, 466 F. Supp. 61 (D. Mass. 1978). For a discussion of these post-*Moragne* cases, see Edward J. Balzarini, Jr., *Survival Remedies For Deaths on the High Seas*, 23 DUQ. L. REV. 981 (1985).

A. DOHSA Does not Preempt Survival Actions Under Either General Maritime Law or State Law

In *Zicherman*, the Supreme Court concluded that DOHSA governs claims filed in U.S. courts that arise under the Warsaw Convention.⁵⁵ However, many contend that DOHSA is not the exclusive remedy for actions arising out of aviation disasters on the high seas. Rather, the Act may be supplemented with survival actions brought under either general maritime or state law.⁵⁶ In support of this argument, claimants advance three basic arguments: (1) because there is no clear policy to the contrary in either the statutory language or legislative history, supplemental survival actions are permissible; (2) to accept DOHSA as an exclusive remedy would destroy the uniformity among signatory members to the Warsaw Convention, many of which sanction the recovery of survival remedies;⁵⁷ and (3) to deem DOHSA preemptive of all other sources of recovery would violate public policy.⁵⁸

55. *Zicherman*, 116 S. Ct. at 636.

56. Some who advocate supplementing DOHSA also contend that DOHSA may be supplemented with the laws of any relevant foreign nation. Petition for Writ of Certiorari, at 12-14, *Saavedra v. Korean Air Lines Co.*, cert. denied, 116 S. Ct. 584 (1996). They reason that, pursuant to *Zicherman*, DOHSA is applicable to cases arising out of death on the high seas. *Id.* Section 764 of DOHSA provides that "[w]henever a right of action is granted by the law of any foreign State on account of death . . . such right may be maintained in an appropriate action. . . ." 46 U.S.C. app. § 764 (1994). Applying this section, some litigants argue that survival damages are recoverable under foreign laws, in addition to any recovery to which the parties are entitled under DOHSA, as long as the foreign nation provides for a survival cause of action. *Dooley v. Korean Air Lines Co.*, No. 96-5278, 1997 WL 380297, at *2 (D.C. Cir. 1997). Several lower court decisions lend support to this claim. *See e.g.* *Noel v. Linea Aeropostal Venezolana*, 260 F. Supp. 1002, 1006 (S.D.N.Y. 1966) (dual claims are permitted under sections 762 and 764 as long as there is no double recovery); *Fernandez v. Linea Aeropostal Venezolana*, 156 F. Supp. 94, 96-98 (S.D.N.Y. 1957) (holding that plaintiffs may litigate concurrent claims under section 761 and section 764). While this argument is not without merit, several lower court decisions subsequent to the Supreme Court's decision in *Zicherman* have rejected it. Recently, the Eastern District of New York (Platt, J.) determined that where a party files an action under section 762, it is precluded from initiating a similar claim under section 764. The court reasoned that "Congress did not intend . . . for parties to have access to both bases of recovery; rather, it intended to enable parties to maintain causes of action under one of these sections." *Beirn v. Korean Air Lines Co.*, No. 83-4624, slip. op. at 22 (E.D.N.Y. Aug. 28, 1996); *Speir v. Korean Air Lines Co.*, No. 83-4626, slip. op. at 22 (E.D.N.Y. Aug. 28, 1996) (citing to *Begeron v. K.L.M. Royal Dutch Airlines*, 188 F. Supp. 594, 597 (S.D.N.Y. 1960)). The Supreme Court has not determined whether actions under sections 761 and 764 may be initiated concurrently.

57. Nations such as South Korea permit the recovery of survival damages. Therefore, if courts determine that DOHSA may be supplemented with survival actions, there will be true uniformity among Warsaw Convention members, as each nation would permit the same types of claims. *Beirn*, No. 83-4624, slip. op. at 21.

58. Some urge that if DOHSA is deemed the exclusive source of recovery for aviation disasters on the high seas, thereby precluding survival actions, persons exposed to pain and suffering prior to their deaths will be unable to recover once they have passed away. This would lead to a substantial reduction in recoverable damages for victims of international aviation disasters. *See generally Beirn*, No. 83-4624, slip. op. at 20.

Courts have long recognized that survival and wrongful death claims are separate and distinct causes of action.⁵⁹ Wrongful death actions are those brought on behalf of the victim's family for losses they incurred as a result of the decedent's death.⁶⁰ Conversely, survival actions allow the decedent's estate to sustain a claim for personal injury, and thereby recover those damages to which the decedent would have been entitled had he not been killed.⁶¹

DOHSA was enacted as a wrongful death statute.⁶² Further, the text itself does not contain the word "survival."⁶³ Congress did not contemplate including a provision for a survival action,⁶⁴ despite the fact that it was well aware of the distinction between the two claims.⁶⁵ Therefore, it can be argued that DOHSA was only intended to provide for a wrongful death cause of action, and it left an intentional void with respect to survival claims incident to deaths on the high seas.⁶⁶ The existence of such a void meant that courts could fashion a post-*Moragne* body of law recognizing survivorship claims.

Post-*Moragne* decisions have expanded the Supreme Court's holding and concluded that, just as DOHSA does not address available remedies for deaths occurring in territorial waters, it fails to discuss the applicability of survival actions to deaths on the high seas.⁶⁷ These courts conclude that allowing survival actions under either state or general maritime law to provide such remedies as pre-death pain and suffering "comports well with the philosophy of *Moragne*, in that it remedies the non-existence of a federal cause of action"⁶⁸ Furthermore, such courts point out that allowing

59. See *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 576 (1971). See also *Azzopardi*, 742 F.2d at 893.

60. *Gaudet*, 414 U.S. at 576.

61. *Id.*

62. See *supra* notes 16-19 and accompanying text.

63. 46 U.S.C. app. §§ 761-767 (1988).

64. 59 CONG. REC. 4482 (1920).

65. This is evidenced by the fact that, just after enacting DOHSA, Congress promulgated the Jones Act, which provided for both wrongful death and survival claims. For a discussion of the Jones Act, see *infra* note 95 and accompanying text.

66. In *McAleer v. Smith*, 791 F. Supp. 923, 928 (D.R.I. 1992), the court determined that "[s]ince DOHSA is a wrongful death statute which . . . does not address survival of actions, it is entirely appropriate that the courts should fill what would otherwise be a legislative void by allowing the . . . survival action . . . to supplement DOHSA." *Id.* at 928-29.

67. *Barbe v. Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974).

68. *Id.* In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), the Supreme Court stated that "[DOHSA] was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act." *Id.* at 402. The Supreme Court also concluded that "Congress intended to ensure the continued availability of a remedy . . . for deaths in territorial waters; its failure to extend the Act to cover such deaths primarily reflected the lack of necessity for coverage . . . rather than an affirmative desire to insulate such deaths from the benefits of any federal remedy . . . available independently of the Act." *Id.* at 397-98.

survival actions to supplement DOHSA does not conflict with DOHSA's underlying purpose, to provide a wrongful death remedy for deaths on the high seas.⁶⁹

Similarly, these courts have held that while DOHSA may only expressly sanction the recovery of pecuniary damages, it does not prohibit the recovery of non-pecuniary damages, such as pre-death pain and suffering, in supplemental actions.⁷⁰ To the contrary, any express limits on the types of recoverable damages apply solely to wrongful death actions brought under DOHSA, not to supplemental survival actions.⁷¹ Thus, non-pecuniary damages are recoverable under survival actions brought concurrently with claims under DOHSA.⁷²

Those in favor of supplementing DOHSA also assert that to deem DOHSA as the exclusive source of recovery for deaths on the high seas would destroy the uniformity that the Warsaw Convention sought to create.⁷³ The Warsaw Convention was drafted in the context of civil law that, unlike our common law system, does not distinguish between survival and wrongful death actions.⁷⁴ Consequently, many of the signatory members of the Warsaw Convention sanction both wrongful death and survival actions.⁷⁵ Furthermore, the Warsaw Convention sanctions the recovery of survival remedies, specifically decedents' pre-death pain and suffering, in actions arising out of international air disasters over land.⁷⁶ To preclude litigants

69. *Barbe*, 507 F.2d at 800.

70. *Id.*

71. Section 762 limits recovery to "fair and just compensation for the pecuniary loss sustained by the person for whose benefit the suit is brought." 46 U.S.C. app. § 762 (1994) (emphasis added).

72. See e.g. *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1549-50 (11th Cir. 1987); *Law v. Sea Drilling Corp.*, 523 F.2d 793, 795 (5th Cir. 1975); *Barbe*, 507 F.2d at 799; *Greene v. Vantage Steamship Corp.*, 466 F.2d 159, 166 (4th Cir. 1972); *Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc.*, 466 F.2d 903, 909-10 (8th Cir. 1972); *Gray v. Lockheed Aeronautical Systems Co.*, 880 F. Supp. 1559, 1570 (N.D. Ga. 1995); *Rye v. United States Steel Mining Co., Inc.*, 856 F. Supp. 274, 280 (E.D. Va. 1994); *Newhouse v. United States*, 884 F. Supp. 1389 (D. Nev. 1994); *McAleer v. Smith*, 791 F. Supp. 923, 926 (D.R.I. 1992). While some litigants have urged that remedies for non-pecuniary losses are directly recoverable under DOHSA, their claim is without merit. The Sixth Circuit recently rejected this contention when it determined that, in light of the Supreme Court's holding in *Zicherman v. Korean Airlines Co.*, 116 S. Ct. 629 (1996), "there is no serious doubt that DOHSA itself does not provide for such a form of damages." *Bickel v. Korean Air Lines Co.*, 83 F.3d 127, 132 (6th Cir.), *rev'd*, 96 F.3d 151 (6th Cir. 1996).

73. See *supra* note 57 and accompanying text.

74. See *supra* note 28.

75. Stephen J. Fearon, *Recoverable Damages in Wrongful Death Actions Governed By the Warsaw Convention*, 62 DEF. COUNS. J. 367, 375 (1995). See also *supra* note 57.

76. Fearon, *supra* note 75, citing *In re Inflight Explosion on Trans World Airlines*, 778 F. Supp. 625, 636-41 (E.D.N.Y. 1991) (court determined that decedent's beneficiaries may recover for pre-death pain and suffering if they are able to satisfy the following standard by a preponderance of the evidence: they must prove that the victim survived the initial injury and that he was conscious

from initiating survival actions in U.S. courts merely because the disaster occurred on the high seas would destroy the Convention's goal of uniformity.⁷⁷ Thus, DOHSA should not preempt all other sources of recovery.

Perhaps the most compelling argument in support of supplementing DOHSA is that any decision to the contrary violates public policy.⁷⁸ In determining that wrongful death claims are the sole remedy afforded under DOHSA, courts would effectively prohibit remedies for pain and suffering to which the decedent would have been entitled had he lived.⁷⁹ Furthermore, recovery available to victims' beneficiaries would be very limited, given that the Warsaw Convention already imposes a damage cap for actions arising thereunder.⁸⁰ As Justice Chase once stated, "[c]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than withhold the remedy, when not required to withhold it by established and inflexible rules."⁸¹

B. DOHSA Is the Exclusive Remedial Basis for Deaths on the High Seas

Courts such as the Sixth and Ninth Circuits do not permit DOHSA to be

following the initial injury and suffered at the time).

77. Smith, Jr., *supra* note 33, at 197-98. However, the Supreme Court has held that although it was a primary function of the Warsaw Convention to foster uniformity in the law of international air travel . . . this is not an area in which the imposition of uniformity was found feasible. [citations omitted] The Convention neither adopted any uniform rule of its own nor authorized national courts to pursue uniformity in derogation of otherwise applicable law.

Zicherman, 116 S. Ct. at 636 (citations omitted).

78. See generally Colella, *supra* note 15.

79. Hollie v. Korean Air Lines Co., 60 F.3d 90, 93 (2d Cir. 1995). The following are conclusions regarding the level of pre-death pain and suffering incurred by passengers aboard Korean Air Lines Flight 007 after listening to the flight data recorder:

[T]he passengers . . . most certainly heard the missiles strike, heard the explosive sounds of decompression. . . . [T]hey were aware of the plane zooming . . . out of control, and of the rapid descent . . . of the rolls which culminated in the Dutch roll, and spirals, and of at least the entire nine minutes during which they were [descending].

Donald R. Andersen, *Recent Cases and Developments in Aviation Law*, 60 J. AIR L. & COMM. 3 (1994). However, the contrary argument is that "[m]aritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of [those killed on the high seas] and those dependent upon them." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990).

80. This argument is premised on the fact that the Warsaw Convention, and the amended version thereof contained in the Montreal Agreement, imposed a \$75,000 damage cap on recovery. William C. Brown, III, *supra* note 21, at 591. However, the persuasiveness of this argument is minimized given that the damage cap has been raised. Furthermore, numerous international air carriers have voluntarily agreed to waive any applicable damage caps. See *infra* note 122.

81. *The Sea Gull*, 21 F. Cas. 909, 910 (CC Md. 1865) (No. 12,578) (quoted in *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 629-30) (1978) (Marshall, J., dissenting).

supplemented with survival claims for decedents' pre-death pain and suffering in actions arising out of international air disasters over the high seas.⁸² These courts reason that, because DOHSA is the sole basis on which remedies are awarded, it preempts actions under either state or general maritime law. Their conclusions are grounded on essentially two overall premises.⁸³ First, DOHSA limits sustainable causes of action to those for wrongful death.⁸⁴ Additionally, DOHSA specifically provides that recovery shall be limited to remedies for pecuniary loss.⁸⁵ Therefore pre-death pain and suffering damages are not recoverable under either DOHSA or a supplemental action because they are non-pecuniary. To support both of these conclusions, proponents of DOHSA's exclusivity rely on plain language, legislative history and intent, and a desire to provide for uniform recovery in actions filed in U.S. courts.

Advocates of DOHSA's exclusivity assert that the statute's plain language explicitly restricts DOHSA to wrongful death claims.⁸⁶ Section 762 states that recovery "shall be for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned . . . by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought."⁸⁷ In addition, the word "survival" does not appear in the text of the statute, nor is there any implicit reference thereto.⁸⁸

Moreover, to supplement DOHSA with survival actions under either general maritime or state law would require courts to ignore Congressional intent. DOHSA was enacted to provide a basis for wrongful death claims in matters arising out of death on the high seas.⁸⁹ Had Congress intended survival actions under state or general maritime law to supplement DOHSA, it would have so indicated in either the language of the statute or in the legislative history preceding its enactment. The absence of any reference to

82. See *supra* notes 52-53.

83. Supplemental Brief of Defendant-Appellant/Cross-Appellee Korean Air Lines, *Saavedra v. Korean Air Lines Co.*, 93 F.3d 547 (9th Cir.), *cert denied*, 116 S. Ct. 584 (1996).

84. *Id.*

85. *Id.*; see also *supra* note 19.

86. For example, in *Offshore Logistics v. Tallentire*, 477 U.S. 207, 237 (1986) (Powell, J., concurring in part and dissenting in part), Justice Powell cites the lower court opinion for Congress' intent. The court of appeals judge noted that, "[a]bsent a clearly expressed legislative intention to the contrary, the plain words of the statute must ordinarily be regarded as controlling." *Id.* at 237.

87. 46 U.S.C. app. § 762 (1994).

88. *Id.*

89. This is evidenced by the fact that DOHSA was enacted in response to *The Harrisburg*, 119 U.S. 199 (1886), in which the Supreme Court declined to recognize a federal wrongful death cause of action. In addition, Congress modeled DOHSA after Lord Campbell's Act, which solely created this wrongful death cause of action. See *supra* notes 15-19 and accompanying text.

survival actions in either of these sources is significant because it demonstrates that Congress did not intend to provide such damages in DOHSA actions.⁹⁰

At the time of DOHSA's enactment, Congress was well aware of the distinction between wrongful death and survival actions.⁹¹ For example, a few weeks after passing DOHSA, Congress ratified the Jones Act,⁹² which expressly permitted both wrongful death and survival causes of action.⁹³ In contrast, DOHSA only specifically sanctions wrongful death actions.⁹⁴ The inference is that Congress omitted any reference to survival claims from DOHSA because it did not want survival actions to arise out of deaths on the high seas. Thus, to supplement DOHSA with survival actions under other bodies of law would run contrary to Congressional intent.⁹⁵

90. Opponents of this view rely on the Supreme Court's holding in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1990), to show that DOHSA was not intended to be preemptive of other causes of action and therefore may be supplemented with survival actions under other bodies of law. See *supra* notes 34-40 and accompanying text. Their reliance on *Moragne* is misplaced, however. First, *Moragne* dealt with an action for wrongful death occurring not on the high seas, but in territorial waters, a situation to which DOHSA is not even applicable. Had the Court not supplemented DOHSA in this case, plaintiff would not have been able to recover for her losses stemming from defendant's unseaworthiness. *Moragne*, 398 U.S. at 375. Thus, there was a legislative void with respect to recoverable remedies for deaths occurring in territorial waters. In the case of deaths occurring on the high seas, there is no such void because Congress has specifically provided remedies for deaths on the high seas, namely, a wrongful death action under DOHSA. Furthermore, although the *Moragne* Court allowed an additional claim to run concurrently with the DOHSA claim, it only sanctioned a supplemental wrongful death action under general maritime law. *Id.* To supplement DOHSA with a survival action would be wholly inconsistent with Congress' intent underlying the Act, and would allow a court to circumvent any legislation that it deemed unfair or imprudent. As the Supreme Court stated in *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."

91. *Tallentire*, 477 U.S. at 214-16. See also *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("[w]e assume that Congress is aware of existing law when it passes legislation").

92. 46 U.S.C. app. § 688 (1994).

93. For a thorough discussion of the Jones Act, see Richard A. Givens, *MANUAL OF FEDERAL PRACTICE*, § 1.90 (4th ed. 1987); see also Moris Davidovitz, *Aviation Deaths on the High Seas: The Flight into Maritime Law*, 10 *HASTINGS INT'L & COMP. L. REV.* 57, 70-71 (1986); Smith, *supra* note 33, at 186; see also *Miles*, 498 U.S. at 32-34.

94. 46 U.S.C. app. § 761 (1988).

95. Opponents of this view indicate that the distinction between the Jones Act and DOHSA is not decisive given that both of these enactments were passed hurriedly and thus were not drafted carefully. They reason that the presence of a survival provision in the Jones Act, and the absence thereof in DOHSA, was "probably unintentional" and was due simply to the poor drafting of each statute. *McAleer v. Smith*, 791 F. Supp. 923, 928 (D.R.I. 1992). Moreover, in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), the Supreme Court stated that "[t]he Jones Act itself was not the product of careful drafting or attentive legislative review. . . . Thus, a remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command our adherence in analogous contexts." *Id.* at 283 (citations omitted). But this argument fails to consider the fact that another version of DOHSA was proposed and brought before Congress a number of years before the current statute was enacted. This suggests that Congress did not ratify this legislation in a hurried fashion, but

The history of cases under the Federal Employers Liability Act ("FELA")⁹⁶ serves as further proof that DOHSA was intended to provide exclusively for wrongful death actions in cases arising out of deaths on the high seas.⁹⁷ In its original form, FELA permitted only wrongful death claims.⁹⁸ In *Michigan Cent. R.R. Co. v. Vreeland*,⁹⁹ the Supreme Court held that survival actions could not be sustained in FELA claims because they were not specifically provided for in the statute's plain language.¹⁰⁰ Moreover, the Court determined that FELA was preemptive of all state and local regulations on the same subject; thus, it could not be supplemented with survival claims under other bodies of law.¹⁰¹ Congress later amended FELA to include a survivorship action.¹⁰² Only then did the Supreme Court recognize survival claims because the amended "provision expresses the deliberate will of Congress."¹⁰³

Another justification in support of DOHSA's exclusivity is that section 762 of DOHSA specifically limits recovery to pecuniary losses.¹⁰⁴ Decisions that permit non-pecuniary relief in DOHSA claims nullify the statute's plain language and circumvent Congressional intent. Therefore, it logically follows that non-pecuniary damages, specifically those for pre-death pain and suffering, are not recoverable under the statute.¹⁰⁵ Recent decisions have upheld this restriction in the context of other non-pecuniary damages.¹⁰⁶

rather was careful in determining the precise language that would be contained therein. *See supra* note 16 and accompanying text.

96. 45 U.S.C. §§ 51-60 (1994).

97. 45 U.S.C. § 59 (1994).

98. *Miles*, 498 U.S. at 32-34. FELA was first enacted on April 22, 1908. Like DOHSA, it was modeled after Lord Campbell's Act. *Id.* at 32 (*citing to Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59 (1913)).

99. *Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59 (1913).

100. *Vreeland*, 227 U.S. at 59. In denying the right to initiate survival claims under FELA, the Court concluded that "[t]he act of 1908 does not provide for any survival of the right of action created in behalf of an injured employee." *Id.* at 67-68. Justice Lurton determined that his strict construction of FELA was supported by Congressional intent in enacting the legislation. Justice Lurton determined that, in enacting FELA, Congress intended to provide recovery to the families of those employees killed "for the loss and damage resulting to them financially by reason of the wrongful death." *Id.* at 68.

101. *Id.* at 66-69; *see also* *St. Louis, Iron Mountain & S. Ry. Co. v. Craft*, 237 U.S. 648, 656 (1915) (Supreme Court held that FELA could not be supplemented with a survival action under state law). After these decisions, Congress modified FELA on April 5, 1910, to include Section 9, which provided that an injured employee's cause of action survives him. *Id.* at 657.

102. *Craft*, 237 U.S. at 657.

103. *Id.* at 658.

104. 46 U.S.C. app. § 762 (1994); *see also supra* note 19.

105. *See* Supplemental Brief on Defendant-Appellee/Cross-Appellant Korean Air Lines Co., at 3, *Saavedra v. Korean Air Lines Co.*, 93 F.3d 547 (9th Cir.), *cert. denied*, 117 S. Ct. 584 (1996).

106. *See Offshore Logistics v. Tallentire*, 477 U.S. 207, 232 (1986) ("survivors should be restricted to the recovery of their pecuniary losses. . . ."); *Mobile Oil Corp. v. Higginbotham*, 436 U.S.

Specifically, in *Zicherman*, the Supreme Court denied recovery of non-pecuniary damages to victims' survivors.¹⁰⁷ The Court held that where DOHSA applies, it may not be supplemented with actions brought under other bodies of law in order to provide for the recovery of non-pecuniary damages.¹⁰⁸

To permit recovery for non-pecuniary losses in actions arising out of international aviation disasters occurring on the high seas would run contrary to Congressional intent. In enacting DOHSA, Congress expressly limited recovery to pecuniary losses sustained.¹⁰⁹ Where, as here, Congress has

618, 625 (1978) (holding that loss of society damages are not recoverable under DOHSA and that DOHSA may not be supplemented with general maritime law); *see also* *Bickel v. Korean Air Lines Co.*, 83 F.3d 127, 131-32 (6th Cir.) (the court precluded recovery damages for loss of society, survivor's grief and pre-death pain and suffering on grounds that such are non-pecuniary losses and are therefore not recoverable under DOHSA); *rev'd*, 96 F.3d 151 (6th Cir. 1996); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1348 (9th Cir. 1987) (holding that punitive damages are non-pecuniary and are therefore not recoverable under DOHSA); *In re Air Disaster Near Honolulu, Hawaii*, 792 F. Supp. 1541, 1544-45 (N.D. Cal. 1990). In *In re Air Disaster Near Honolulu, Hawaii*, the court held that non-pecuniary damages may not be recovered in any action under DOHSA. *Id.* The court also concluded that DOHSA may not be preempted or supplemented. *Id.* at 1546. This decision was eventually overturned, and non-pecuniary damages were permitted, on the grounds that such are sanctioned by the Warsaw Convention. *Id.* However, this decision was rendered prior to the Supreme Court's decision in *Zicherman v. Korean Air Lines Co.*, 116 S. Ct. 629 (1996), in which the Court determined that the Warsaw Convention does not determine the nature of recoverable damages. *Id.* at 636. *See also supra* notes 10-14 and accompanying text.

107. *Zicherman*, 116 S. Ct. at 636. In *Zicherman*, the Supreme Court recognized that DOHSA expressly limits recovery to pecuniary losses sustained. Therefore, the Court precluded plaintiffs from recovering for loss of society, either under DOHSA or in a supplemental wrongful death action, because such damages are non-pecuniary. While the *Zicherman* holding was limited to loss of society damages, it necessarily follows from the language of the opinion that the recovery of any non-pecuniary loss, including decedent's pre-death pain and suffering, is prohibited in both DOHSA actions and in supplemental survival claims under state or general maritime law. Opponents of this view argue that the *Zicherman* Court in fact upheld the recovery of decedent's pre-death pain and suffering in a supplemental survival action. Therefore, opponents urge that *Zicherman* cannot be relied upon as an indication of DOHSA's preemptive nature. *Beirn v. Korean Air Lines Co.*, No. 83-4624, slip. op. at 11-12 (E.D.N.Y. Aug. 28, 1996). "[T]o interpret any language in the *Zicherman* opinion as limiting a plaintiff's remedy . . . to wrongful death may . . . be an improper expansion of that case's holding." *Id.* However, this contention is not a proper interpretation of the Court's holding. The Second Circuit in *Zicherman* allowed the recovery of pre-death pain and suffering damages in supplemental survival actions. *Zicherman v. Korean Air Lines Co.*, 43 F.3d 18, 23 (2d Cir. 1996). In its petition for certiorari, *Korean Air Lines* failed to raise this award on appeal. Therefore, the Supreme Court expressly declined to address the issue of DOHSA's preemption of supplemental survival actions. *Zicherman*, 116 S. Ct. at 636 n.4. Yet some lower courts have concluded that, because the issue of recoverability of damages for pain and suffering in supplemental actions was never appealed, this issue is not subject to further review under the doctrines of collateral estoppel or issue preclusion. *See Beirn*, No. 83-4624, slip. op. at 20. Therefore, they conclude that damages for pain and suffering are recoverable in supplemental survival claims. *Id.*

108. *Zicherman*, 116 S. Ct. at 636. The Court held that "where DOHSA applies, neither state law, nor general maritime law, can provide a basis for recovery of loss-of-society damages." *Id.* (citations omitted).

109. In section 762, Congress provided that recovery is to be limited to "a fair and just

specifically addressed an issue within the language of a statute, courts are not free to interpret the statute in a way that ignores Congress' intent.¹¹⁰

The availability of a supplemental survival cause of action in cases to which DOHSA applies threatens the Warsaw Convention's goal of uniformity.¹¹¹ If DOHSA were supplemented by survival actions under state or general maritime law, air carriers could be forced to defend fifty separate actions in the U.S. alone.¹¹² As *Moragne* itself implied, "DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy . . . because of the interest in uniformity. . . ."¹¹³

IV. RECENT DECISIONS ON THIS ISSUE

Recently, several lower courts have addressed the issue of DOHSA's exclusivity in detail. These decisions are noteworthy because they are among the first to have specifically considered the recoverability of damages for decedents' pre-death pain and suffering.

D.C. Circuit

In *Forman v. Korean Air Lines Co.*, the D.C. Circuit upheld the plaintiff's recovery for damages for pre-death pain and suffering.¹¹⁴ The court concluded that there was sufficient evidence to indicate that the decedent

compensation for the pecuniary loss sustained." 46 U.S.C. app. § 762 (1994). In describing recoverable damages under DOHSA in such a manner, Congress indicated that recovery for pecuniary losses is equitable; thus implying recovery of non-pecuniary losses is not necessary.

110. See *supra* note 90.

111. See *Bickel*, 83 F.3d at 130 ("The Warsaw Convention, however, embodies a concrete policy of uniformity and certainty, which would be undermined by the use of state choice of law rules.") (citations omitted).

112. Luis F. Ras, *Warsaw's Wingspan Over State Laws: Towards a Streamlined System of Recovery*, 59 J. AIR L. & COMM. 587, 603-04 (1994) (citing to *In re Air Crash at Lockerbie, Scotland*, 928 F.2d 1267 (2d Cir. 1991)); see also *Velazquez v. Aerovias Nacionales de Colombia, S.A.*, 747 F. Supp. 670, 676 (S.D. Fla. 1990).

113. *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 624 (1978).

114. 84 F.3d 446 (D.C. Cir.), *cert. denied*, 117 S. Ct. 582 (1996). In *Forman*, Korean Air Lines argued that the award for pre-death pain and suffering in supplemental survival actions should be reversed in light of the Supreme Court's decision in *Zicherman*. *Id.* at 448. However, Korean Air Lines failed to raise this contention in its briefing papers, given that *Zicherman* was decided after the reply papers were filed. *Id.* The D.C. Circuit refused to allow Korean Air Lines to amend its reply papers, and therefore upheld the lower court's award for pre-death pain and suffering. The court concluded that, while *Zicherman* had not yet been decided, counsel for Korean Air Lines could have included the arguments presented in *Zicherman* in its papers, particularly given that counsel argued *Zicherman* before the Supreme Court. *Id.* While the D.C. Circuit did uphold the lower court's award of damages for pre-death pain and suffering in supplemental survival actions, it specifically declined to decide whether such damages would be available in light of the Supreme Court's decision in *Zicherman*. *Id.* at 448-49.

survived the initial missile strike on KAL Flight 007 and that she was conscious throughout most of the plane's descent.¹¹⁵

Sixth Circuit

Conversely, in *Bickel v. Korean Air Lines Co.*, the Sixth Circuit held that non-pecuniary losses for decedents' pre-death pain and suffering are not recoverable.¹¹⁶ Furthermore, it held that DOHSA was exclusive and may not be supplemented.¹¹⁷

Ninth Circuit

In *Saavedra v. Korean Air Lines Co.*, the Ninth Circuit agreed with the Sixth Circuit's view that DOHSA is preemptive; thus, the court refused to supplement DOHSA with survival actions under general maritime or state law.¹¹⁸ The court concluded that *Higginbotham* and *Zicherman* preclude recovery of non-pecuniary damages, either under DOHSA or under a supplemental claim.¹¹⁹

V. PROPOSAL

When the Supreme Court revisits this issue later this term, it should conclude that DOHSA is the sole source of recovery for actions arising out of international air disasters on the high seas.

DOHSA was enacted to provide a wrongful death remedy for deaths on the high seas.¹²⁰ Had Congress intended to allow litigants to bring survival actions concurrently with DOHSA claims, it most certainly would have included a survival provision within the statute. This contention is supported by analyzing the history of FELA, in which the Supreme Court recognized a survival action only after Congress amended the original version to include

115. *Id.* at 449.

116. 83 F.3d 127 (6th Cir.), *rev'd*, 96 F.3d 151 (6th Cir. 1996).

117. This decision was later reversed by the same court in *Bickel v. Korean Air Lines Co.*, 96 F.3d 151 (6th Cir. 1996). However, it was overturned on grounds that the Sixth Circuit should not have addressed the exclusivity of DOHSA in its first decision because Korean Air Lines failed to raise it on appeal. *Id.* Because the initial Sixth Circuit opinion precluding survival claims was reversed on procedural grounds, the subsequent decision should not be relied on as an indication that the Court would now permit DOHSA to be supplemented.

118. *Saavedra v. Korean Air Lines Co.*, 93 F.3d 547, 553-54 (9th Cir.), *cert. denied*, 117 S. Ct. 584 (1996).

119. *Id.* at 553.

120. *See supra* notes 15-19 and accompanying text.

such a remedy.¹²¹ Similarly, because DOHSA does not include a survival clause, it may not be supplemented with survival actions under either state or general maritime law. Therefore, the Supreme Court must hold that DOHSA is the exclusive basis for actions involving international air disasters on the high seas.

While this result is appropriate given the current status of the law, it is by no means the preferable one. If the Supreme Court were to conclude that DOHSA is preemptive, it would effectively extinguish numerous claims for pre-death pain and suffering currently being litigated in U.S. courts. Additionally, it would leave victims of international aviation disasters without adequate compensation, given the limited liability to which air carriers are exposed under the Warsaw Convention.¹²² Because of such inequity, coupled with the impracticality of supplementing DOHSA with actions under state or general maritime law, Congress must amend the law in one of two ways.¹²³

On the one hand, Congress could amend DOHSA to provide for survival claims in actions for death on the high seas. Under this plan, Congress would have to modify section 761 to allow the decedent's estate to sustain an action

121. See *supra* notes 96-103 and accompanying text.

122. Indicating the existence of inadequate recovery levels, the Department of Transportation recently approved a measure which raised the amount to which air carriers may be liable under the Warsaw Convention to about \$140,000. *US Approves IATA Pacts on Passenger Liability*, BUSINESS TIMES, Jan. 17, 1997, at 2, available in 1997 WL 2963703. Recently, however, the International Air Transport Association ("IATA") has released an agreement whereby signatory members of the Warsaw Convention will not apply any liability limits set forth in the Convention to actions arising out of international aviation disasters. *Id.* This agreement was approved by the U.S. Department of Transportation. *Id.* Consequently, DOHSA victims' families could ostensibly recover an unlimited amount of damages through wrongful death claims when a loved one is killed. While this may alleviate some of the injustice that would accompany a determination of DOHSA's exclusivity, it would by no means remedy the situation completely. Decedents would still not be entitled to recover from what could potentially be months of pain and suffering prior to their deaths.

123. Some practitioners suggest that, rather than amend DOHSA or replace it with other legislation, Congress should withdraw from the Warsaw Convention altogether. Interview with Andrew C. Hall, Esquire, in Miami, Fla. (Mar. 3, 1997). They argue that the Warsaw Convention is merely an outdated, unfair treaty promulgated as a result of pressures from the airline industry which sought to limit its liability, regardless of the deleterious impact this would have on passengers. Specifically, air carriers sought protection against punitive damage awards, which are not permitted in suits arising under the Warsaw Convention, no matter how egregious their conduct may have been. Accordingly, these practitioners urge that aviation disasters should be governed by tort law, such that victims of air disasters would be able to attain whatever common law and statutory awards afforded by the jurisdiction in which they file suit. *Id.* This would include both wrongful death remedies, survival damages, and punitive damages, where applicable. *Id.* See also *Dateline NBC* (NBC television broadcast, Oct. 13, 1996). "The Warsaw Convention was drafted in 1929, two years after Charles Lindbergh made the first nonstop flight from New York to Paris." *Id.* (statement by Lee Creindler) "Who could argue that [the Warsaw Convention] was justified then, but to stay with this principle of limited liability through 1996 is insane, utterly insane." *Id.* (statement by Jack Ford).

on his or her behalf. Congress must also amend section 762 to include the following clause:

Furthermore, if an action is brought on behalf of a decedent's estate for losses sustained prior to his death, recovery shall be limited to a fair and just compensation for those losses sustained.

In the alternative, Congress could enact new legislation to govern all international air disasters, rather than apply DOHSA to such claims.¹²⁴ DOHSA was enacted at a time when commercial aviation was not as widespread as it is today; thus, it is ill equipped to handle the complex issues that arise out of aviation litigation. Accordingly, DOHSA should be replaced.

The new legislation would be aimed specifically at claims arising under the Warsaw Convention. It would apply to all international air disasters, regardless of whether they occur on land or over seas.¹²⁵ The statute would grant exclusive jurisdiction over international aviation disasters to the federal courts.¹²⁶ It would emulate the domestic laws of such foreign nations as England, Canada, and Germany, each of which have adopted legislation specifically directed at international aviation litigation.¹²⁷

124. Congress is currently considering a bill that would deny DOHSA's application to aviation disasters. This legislation, first proposed by Representative McDade of Pennsylvania, amends DOHSA by providing that the statute is restricted to "actions for death on the high seas and other navigable waters." H.R. 2005, 105th Cong. § 1 (1997). This bill passed in the House on July 30, 1997. *Id.* It was introduced in the Senate by Senator Specter of Pennsylvania as Senate bill 943. *See* S. 943, 105th Cong. § 1 (1997). The Senate is set to vote on this bill during the second session of the 105th Congress.

If enacted, this legislation would cause any action arising out of aviation disasters to be governed by state tort law. In doing so, the law would enable litigants to recover both pecuniary and non-pecuniary damages in wrongful death and survivorship actions. While this law would allow for more equitable recovery, the manner in which it achieves this result creates the potential for gross inconsistencies in recovery. Those litigants who initiate their claims in one state may recover far less than others who bring claims in different states given differences in state tort law, even though litigants' actions may arise out of the same aviation disaster. Furthermore, this legislation potentially would subject air carriers to individual suits in 50 different states. Therefore, rather than amend DOHSA, Congress should take the time to enact legislation applicable solely to claims arising under the Warsaw Convention. *See infra* notes 125-29 and accompanying text.

125. *Id.* (statement by Jack Ford)

There's another set of arcane rules called [DOHSA], applying to crashes in international waters. Awards are again limited, this time to economic losses only. That means that the amount of money the victims might have provided for their survivors. And where do international waters begin? Some lawyers say it's three miles off the U.S. shore, others say 12 miles.

Id. Consequently, the current standard could be totally different, depending upon where the crash occurred. *Id.*

126. This section is modeled after the Senate Bill 3305, proposed in 1968 by Senator Tydings. Albert Lin, *Jurisdictional Splashdown: Should Aviation Torts Find Solace in Admiralty?*, 60 J. AIR L. & COMM. 409, 437 (1994).

127. England ratified the Carriage by Air Act of 1932, which was later replaced by the Carriage by Air Act of 1961. P.P.C. Haanappel, *The Right to Sue in Death Cases Under the Warsaw*

While the proposed legislation must be comprehensive, only the relevant portions will be drafted for the purposes of this Note:

Clause 1: All claims arising out of international aviation disasters will be under the exclusive jurisdiction of the federal courts.

Clause 2: In claims arising out of such incidents, claims may be brought either on behalf of the decedents' direct beneficiaries (wrongful death claims), or on behalf of the decedents' estate (survival actions).

Clause 4: Recoverable damages shall include those for pecuniary and non-pecuniary losses sustained. Punitive damages may not be recovered under this section.

Clause 5: Damage awards are limited to the amount set forth by the Department of Transportation.¹²⁸ However, air carriers are free to engage in any international agreement to waive this damage limit.¹²⁹

CONCLUSION

The current practice of supplementing DOHSA in some jurisdictions, while deeming it exclusive in others, must be changed. A uniform system of recovery must be established for actions arising out of international air disasters. This must be accomplished by Congress, not the judiciary. However, until the legislature acts, courts must conclude that DOHSA preempts all other sources of recovery.

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Convention, 6 AIR LAW 66, 72-73 (1981). Canada enacted the Carriage by Air Act in 1947, which applies specifically to causes of action under the Warsaw Convention. This legislation allows victims' dependents to recover in wrongful death actions. *Id.* at 70. Similarly, the German Air Traffic Act allows for recovery by any person to whom the decedent was liable for support. *Id.* at 74-75. While the model statute contained in this Note resembles those of England, Canada, and Germany, it differs in that this statute expressly contains a survival clause.

128. See *supra* note 122.

129. See *supra* note 123.